PACKIAM & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) September 14, 1971]

[Penang — Criminal Appeal No. 39 of 1971]

Penal Code, ss. 411 & 414 — Dishonestly receiving stolen property — Assisting in concealment of stolen property.

Criminal Law and Procedure — Charge — Dishonestly receiving stolen property — Indentification of stolen goods — Finding of fact — Whether appellate court can override findings of trial court.

Evidence — Admissibility — Statements to police officer — How much of information received from accused may be proved — Criminal Procedure Code (S.S. Cap. 21) s. 124 — Evidence Ordinance, 1950, ss. 24, 25, 26, 27, and 114(a).

The first appellant was charged with voluntarily assisting in disposing of stolen property, to wit, 3 transistor radios, one T.V.-shaped cigarette lighter, 1 pair of binoculars and 1 wall clock and the second appellant was charged with dishonestly retaining them. Both were tried in a joint trial and convicted and each was sentenced to 3 months' imprisonment.

They appealed against their convictions.

Objection to the conviction was taken on the submission that the stolen articles had not been properly identified as belonging to the complainant.

Prosecution evidence rested mainly on the evidence of a police personnel. He testified that: "When accused No. 2 produced box and things in it, he said something about it and contents. He said these things were brought by K. M. Packiam for him to keep in safe custody. This was what he said before leaving to collect the box and contents". No objection was taken by the defence counsel to the admissibility of this evidence, and the learned magistrate considered that the prosecution had established a *prima facie* case against the appellants, and held that on the evidence the first appellant was guilty of voluntarily assisting in the disposal, and the second appellant of dishonestly retaining the stolen property.

The question to be considered was whether this piece of evidence was admissible.

Held, allowing the appeal and quashing the convictions:

(1) the finding on the identification of the stolen articles was primarily a finding of fact based on the evidence of a witness whom the learned trial magistrate had the privilege of hearing and seeing. In matters of such evidence, the appellate court does not normally override the findings of the trial court;

(2) inadmissible evidence does not become admissible by reason of the failure of counsel to object thereto, and the appellate court must disregard all such evidence;

(3) the said piece of evidence was nothing more than an admission that the second appellant was constituted a bailee of the said goods. Therefore, without there being any evidence that he knew of their dishonest origin, the second appellant could not be said to have been dishonestly in possession;

(4) as the said words were not limited to and did not relate to the fact of the discovery, they were inadmissible under section 27 of the Evidence Ordinance;

(5) thus, once the words were removed, there was no evidence that the first appellant disposed of the property to the second appellant or that the second appellant dishonestly retained the property. Therefore, the convictions cannot stand and must be quashed.

Cases referred to:-

(1) *Wong Kok Keong* v. *R.* [1955] M.L.J. 13 at p. 16.

(2) *Lee Yew Seng & Ors.* v. *Public Prosecutor* [1967] 1 M.L.J. 215 at p. 216, F.C.

(3) *R.* v. *Ramasamy* [1965] A.C. 1.

(4) *Khalid Panjang & Ors.* v. *Public Prosecutor (No. 2)* [1964] M.L.J. 108.

(5) *Amin bin Mohamed* v. *R.* (1956) 2 M.C. 251, C.A.

(6) *Surif* v. *Public Prosecutor* [1965] 1 M.L.J. 36, F.C.

MAGISTRATE'S CRIMINAL APPEAL.

A. J. Muttiah for the first appellant.

K. Vijayanathan for the second appellant.

Azmel bin Haji Ma'amor (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: The appellant K.M. Packiam s/o Mahalingam now referred to as the first appellant was charged with voluntarily assisting in disposing of stolen property, to wit 3 transistor radios, one T.V.-shaped cigarette lighter, 1 pair of binoculars and 1 wall clock and the second appellant, Samsudin s/o S. P. Ibrahim Ali was charged with dishonestly retaining such stolen property. Both were tried in a joint trial and both were convicted and sentenced to 3 months' imprisonment. They now appealed.

Objection to the conviction was taken on the submission that the stolen articles had not been properly identified as belonging to the complainant. It was said that there had been no identification parade of the stolen goods in the sense that they were not put amongst others of similar makes and the owner asked to pick out what he had lost but that was not quite true.

At the trial, the complainant gave evidence of his ownership and loss when his house was broken into. He did not detail his losses in his first information report but even counsel for the appellants were forced to admit that his concern at the discovery of the housebreaking was to report that fact and the fact of losses and that he could only descend into particulars after he had some time to list them. There was in particular one item which was of some relevance — it was the T.V.-shaped cigarette lighter. Though it was admitted that such a lighter could be purchased, its peculiar shape must point to the coincidence of its loss with its subsequent recovery. This coincidence must reflect favourably on the identification of the other articles.

The point however is that on the identification of the stolen articles, the finding is primarily a finding of fact based on the evidence of a witness whom the learned trial magistrate had the privilege of hearing and seeing and I have not. It is a well-established rule that in matters of such evidence, the appellate court does not normally override the findings of the trial court.

The prosecution called one other lay-witness — one Maniam s/o Marimuthu whose evidence on the whole was so unsatisfactory that it was no surprise that he was impeached. I am satisfied that his impeachment was, as held by the trial magistrate, successful and no reliance can therefore be laid on his testimony.

The rest of the prosecution evidence came from police personnel. Apart from formal evidence it consisted mainly of testimony that inspector Tan Ghee Leong arrested the first appellant who subsequent thereto took him to No. 56 Penang Street where he met the second appellant. At his request, the second appellant produced a box in which the stolen articles

were found. Inspector Tan Ghee Leong testified further that:

"When accused No. 2 produced box and things in it, he said something about it and contents. He said these things were brought by K. M. Packiam for him to keep in safe custody. This was what he said before leaving to collect the box and contents."

No one at the trial ever considered whether this evidence was admissible. The prosecution adduced it and there was no objection from defence counsel. The learned magistrate accepted it in all the implications of the words and perhaps more, but of course inadmissible evidence does not become admissible by reason of the failure of counsel to object thereto and an appellate court must disregard all such evidence: see *Wong Kok Keong* v. *R.*[1] at page 16.

On this evidence the learned magistrate considered that the prosecution had established a *prima facie* case against the appellants. He in fact referred to this evidence specifically in his grounds of decision and it is clear he relied greatly on it. He therefore held that on the evidence the first appellant was guilty of voluntarily assisting in the disposal and the second appellant of dishonestly retaining the stolen property.

The question therefore to be considered is whether it is admissible. If it is sought to be admitted as a confession by the second appellant, it is not in compliance with section 26 of the Evidence Ordinance and it is in violation of section 25. See also: *Lee Yew Seng and Ors.* v. *Public Prosecutor,*[2] at page 216. But in its context it is clearly not a confession in the sense of an admission of guilt. If at all admissible, it was only an admission by the second appellant that he had received the goods but there was nothing in this admission to indicate that he had obtained such possession of the stolen articles and acquired such a knowledge of their origin that he should be said to have dishonestly retained them. As I read and understood the words, they were nothing more than an admission that he was constituted a bailee of these goods and in my view without any evidence that he knew of their dishonest origin, he could not be said to have been dishonestly in possession.

The next question that arises in the consideration of the admissibility of these words is whether they could be admitted under section 27 of the Evidence Ordinance. The previous doubt entertained whether evidence admissible under section 27 was not caught by section 124 of the Criminal Procedure Code has now been resolved in *R.* v. *Ramasamy,*[3] which is a decision of the Privy Council on appeal from the Supreme Court of Ceylon on a legislation which is in *pari materia* with ours and is therefore binding on the courts of this country: see *Khalid Panjang and Ors.* v. *Public Prosecutor (No. 2).*[4] There it was held that evidence falling within section 27 could lawfully be given at a trial even though it would otherwise be excluded as a statement made in the course of an investigation under section 124 and that such statements to a police officer applied to both written records and oral statements and extended to an accused person as much as to any other witness, but the words admitted must be limited to and relate distinctly to the fact of discovery. In the light of this decision and following the example of the learned trial judge in that case which was commended by their Lordships of the Privy Council as being correct and fair, I am of the view that these words were not limited to and did not relate distinctly to the fact of the discovery and were therefore inadmissible under section 27.

Lastly, it is apparent that even if these words were to come from the mouth of the second appellant in open court or were admissible in a confession properly taken in accordance with section 24 and section 26 of the Evidence Ordinance it is inadmissible as against the first appellant: see *Amin bin Mohamed* v. *R.*[5] There would appear however to be a contrary decision *Surif* v. *Public Prosecutor*[6] but this decision also laid down that though admissible against the other accused the confession which was a proper one could only be used to support other evidence and of other evidence, corroborative or otherwise, there was none in this case.

The words are in my view clearly inadmissible on any score so that as against the second appellant, there is no need to consider the presumption against him under section 114(a) of the Evidence Ordinance.

Once they are removed, all that the prosecution was left with was evidence that both the appellants knew where the stolen articles were left but there was not the slightest shred of evidence that the first appellant disposed of the property to the second appellant or that the second appellant dishonestly retained the property.

The convictions therefore could not stand. They are now quashed and the order for imprisonment set aside.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; Daljit & Vijaya.*

LEE THIAN BENG v. PUBLIC PROSECUTOR

[F.C. (Suffian, Gill and Ong Hock Sim F.JJ.) February 21, 1972]

[Kuala Lumpur — Federal Court Criminal Appeal No. 17 of 1971]

Penal Code, ss. 99, 100, 102 and 325 — Voluntarily causing grievous hurt — Plea of private defence — When available — Necessary self-defence — Evidence Ordinance, 1950, s. 105.

Criminal Law and Procedure — Manslaughter — Charge reduced to voluntarily causing grievous hurt — Plea of self-defence — Unnecessary excessive force — Plea failing.

Evidence — Burden of Proof — General exceptions in Penal Code — Onus on accused — Evidence Ordinance, 1950, s. 105.

The appellant had been tried on a charge of culpable homicide not amounting to murder. At the close of the prosecution case the charge against the appellant was reduced to voluntarily causing grievous hurt under section 325 of the Penal Code and he was convicted on this charge and sentenced to three years' imprisonment.

On appeal,